

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONALD L. SKEENS JR.,)
Plaintiff,) CASE NO. C12-5070-RAJ-MAT
v.)
MICHAEL J. ASTRUE, Commissioner) REPORT AND RECOMMENDATION
of Social Security,) RE: SOCIAL SECURITY
Defendant.) DISABILITY APPEAL

14 Plaintiff Donald L. Skeens Jr. proceeds through counsel in his appeal of a final
15 decision of the Commissioner of the Social Security Administration (Commissioner). The
16 Commissioner denied Plaintiff's applications for Supplemental Security Income (SSI) and
17 Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge
18 (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all
19 memoranda of record, the Court recommends that this matter be REVERSED and
20 REMANDED for further proceedings.

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**REPORT AND RECOMMENDATION RE:
SOCIAL SECURITY DISABILITY APPEAL
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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1964.¹ He completed high school (special education) and previously worked as a photocopier and a construction worker. (AR 182.)

Plaintiff filed applications for DIB and SSI on January 16, 2007, and October 19, 2007, respectively. (See AR 159-165.) Those applications were denied initially and on reconsideration, and Plaintiff timely requested a hearing. (AR 79-81, 84-85, 90-91.)

On June 8, 2010, ALJ Gary Suttles held a hearing, taking testimony from Plaintiff and a vocational expert. (AR 32-76.) On June 28, 2010, the ALJ issued a decision finding Plaintiff not disabled. (AR 17-27.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on November 22, 2011 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had attempted to return to work in 2002 and in 2005, but had not engaged in substantial gainful activity since October 19, 2001, the alleged onset date. (AR 19.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found Plaintiff's

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 learning disorder (cognitive impairment), depression, and status-post right index finger injury
02 to be severe. (AR 19.) Step three asks whether a claimant's impairments meet or equal a
03 listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the
04 criteria of a listed impairment. (AR 19-23.)

05 If a claimant's impairments do not meet or equal a listing, the Commissioner must
06 assess residual functional capacity (RFC) and determine at step four whether the claimant has
07 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
08 performing light work, with the following exertional limitations: he can lift and/or carry up to
09 20 pounds maximum occasionally, 10 pounds frequently; walk 6 of 8 hours; stand/sit 6 of 8
10 hours. The ALJ found that Plaintiff has "unlimited pushing/pulling and gross and fine
11 dexterity but occasional fingering, grasping, handling, and feeling with the right index
12 finger." (AR 23.) Plaintiff's left hand is normal. Plaintiff cannot climb ladders, ropes, or
13 scaffolds, or run. Plaintiff can have "limited exposure" to heights, dangerous machinery, and
14 extreme cold. (AR 23.) He can climb stairs, bend, stoop, crouch, crawl, balance, twist, and
15 squat. As to mental limitations, the ALJ found that Plaintiff can get along with others,
16 respond and adapt to workplace changes and supervision, understand simple 1- to 2-step
17 instructions, and concentrate and perform simple tasks. With that assessment, the ALJ found
18 Plaintiff unable to perform any past relevant work.

19 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
20 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
21 an adjustment to work that exists in significant levels in the national economy. Considering
22 the Medical-Vocational Guidelines and with the assistance of the vocational expert, the ALJ

01 found Plaintiff capable of performing other jobs, such as work as courier, café attendant, and
02 marking clerk. (AR 26.)

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

11 Plaintiff argues the ALJ erred by (1) failing to state any reason to reject the opinions
12 of Mark Heilbrunn, M.D., and Norma Brown, Ph.D. and yet failing to include all of
13 limitations identified by them; (2) failing to incorporate all of Plaintiff's limitations in the
14 hypothetical question posed to the vocational expert (VE); (3) improperly discrediting the
15 Plaintiff's testimony; and (4) failing to consider all lay evidence. The Commissioner argues
16 that the ALJ's decision is supported by substantial evidence and should be affirmed.

Medical Evidence², RFC Assessment & Vocational Expert Testimony

18 Three of Plaintiff's assignments of error converge into one issue: whether the ALJ
19 included all limitations contained in the credited opinions of examining physicians Mark

20 ² Plaintiff's Opening Brief contains a recitation of "other medical evidence" that is not
21 "inconsistent with the medical opinions of Dr. Heilbrunn and Dr. Brown." (Dkt. 13 at 7-8.) Plaintiff
22 provides no argument or analysis of this evidence, and does not identify any particular error, but
argues simply that the "court should hold that the ALJ's failure to properly evaluate all of the medical
evidence is legal error requiring reversal." (Dkt. 13 at 8.) Without more, the Court — following the
Commissioner's lead (*see* Dkt. 16-1 at 6:5-7) — declines to address this further.

01 Heilbrunn and Norma Brown in his RFC assessment and in his hypothetical posed to the VE.
 02 The Commissioner contends that the ALJ properly translated the opinions of Drs. Heilbrunn
 03 and Brown into functional limitations described in the RFC assessment and in the
 04 hypothetical, and that any translation error was harmless.

05 Legal Standards

06 In general, more weight should be given to the opinion of a treating physician than to a
 07 non-treating physician, and more weight to the opinion of an examining physician than to a
 08 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not
 09 contradicted by another physician, a treating or examining physician's opinion may be
 10 rejected only for ““clear and convincing”” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d
 11 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion
 12 may not be rejected without ““specific and legitimate reasons” supported by substantial
 13 evidence in the record for so doing.” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499,
 14 502 (9th Cir. 1983)). The ALJ may reject physicians' opinions “by setting out a detailed and
 15 thorough summary of the facts and conflicting clinical evidence, stating his interpretation
 16 thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing
 17 *Magallanes*, 881 F.2d at 751). Rather than merely stating her conclusions, the ALJ “must set
 18 forth [her] own interpretations and explain why they, rather than the doctors', are correct.” *Id.*
 19 (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

20 At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and
 21 assess his work-related abilities on a function-by-function basis, including a required narrative
 22 discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; Social Security Ruling (SSR) 96-8p. RFC

01 is the most a claimant can do considering his or her limitations or restrictions. *See* SSR 96-
 02 8p. The ALJ must consider the limiting effects of all of a claimant's impairments, including
 03 those that are not severe, in determining his RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p.

04 Dr. Heilbrunn's Opinions

05 In this case, the ALJ described the opinions of Dr. Heilbrunn without assigning any
 06 particular weight:

07 The results of a consultative examination performed in May 2007 revealed a
 08 normal hand coordination on the left but decreased fine and dexterous
 09 movements and manipulating with the right hand. There was no hand tremor.
 10 His left hands, fingers, and thumbs were normal. On his right hand, his index
 11 finger had a contraction flexure of 30 degrees, increased tenderness at the
 12 proximal interphalangeal joint, and traumatic neuroma. His grip strength was
 13 4-5/5 on the right with sparing of the index finger. Strength was normal in the
 14 left upper extremity. His sensory functions were decreased to 50% at the
 radial aspect and 20% at the ulnar aspect of the right index finger. The
 remainder of the fingers were normal. He did not have any flexion of the right
 distal interphalagneal joint of the index finger and flexion of the proximal
 interphalangeal joint of the index finger to 90 degrees. He was able to almost
 bend to the floor level. The examiner assessed that the claimant had limitation
in the use of the right hand for continuous firm grasping, fine and dexterous
 movements and manipulating abilities, and for feeling on the index finger.

15 (AR 20 (citing AR 337-43) (emphasis added).) The Plaintiff argues that the ALJ erred in
 16 formulating the RFC assessment (AR 23) because he limited only Plaintiff's use of his right
 17 index finger, while Dr. Heilbrunn had found Plaintiff had limited use of his entire right hand
 18 for continuous firm grasping, fine and dexterous movements, and manipulation. Because the
 19 ALJ implicitly credited Dr. Heilbrunn's opinions, Plaintiff contends that the ALJ should have
 20 included all of the limitations identified by Dr. Heilbrunn in the RFC assessment.

21 Plaintiff's arguments are not well taken, because the ALJ's written RFC assessment
 22 and the entirety of the VE's testimony are consistent with the limitations identified by Dr.

01 Heilbrunn. Dr. Heilbrunn found that Plaintiff has “a limitation in the use of the right hand for
 02 continuous firm grasping, fine and dexterous movements and manipulative abilities,” and that
 03 his right index finger is limited in feeling and has pain that “limits his ability of use.” (AR
 04 341.) The ALJ incorporated that finding nearly verbatim in his RFC assessment: “The
 05 examiner assessed that the claimant had limitation in the use of the right hand for continuous
 06 firm grasping, fine and dexterous movements and manipulating abilities, and for feeling on
 07 the index finger.” (AR 20 (emphasis added).)

08 During the hearing, the ALJ described Plaintiff’s right-hand limitations in a slightly
 09 convoluted manner to the VE:

10 [Plaintiff’s] push/pull and gross fine is unlimited except in the right hand. I
 11 will say occasional fingering, occasional fingering (*sic*), grasping, handling,
 12 and feeling with the right index finger. The rest of the hand, the fingering of
 the hands and the things of the fingers appears to be okay.

13 (AR 72-73.) In response, the VE testified that a person with an RFC as described by the ALJ
 14 could perform the jobs of marking clerk, cafeteria attendant, and deliverer. (AR 73-74.) To
 15 the extent that the ALJ retreated from Dr. Heilbrunn’s opinions regarding Plaintiff’s right-
 16 hand limitations beyond the index finger only in the phrasing of that hypothetical, this error
 17 was harmless because Plaintiff’s attorney subsequently asked the VE a follow-up hypothetical
 18 that more completely summarized Dr. Heilbrunn’s opinions as “a limitation in the use of the
 19 right hand for continuous firm grasping, fine and dexterous movements, and manipulating
 20 abilities, and for feeling on the index finger.” (AR 74.) In response to Plaintiff’s attorney’s
 21 hypothetical variation, the VE reiterated his testimony that a person with those limitations
 22 could work as a deliverer, cafeteria attendant, or marking clerk because none “of the three

01 jobs that I cited are particularly dexterous.” (AR 75.)

02 Plaintiff takes issue with the VE’s follow-up testimony regarding dexterity, arguing
 03 that the identified jobs actually *are* dexterous and that Plaintiff cannot perform the jobs in
 04 light of Dr. Heilbrunn’s right-hand limitation for “continuous firm grasping, fine and
 05 dexterous movements and manipulating abilities” and the attendant index-finger pain. (AR
 06 341.) First, with regard to the dexterity required to perform the VE’s identified jobs, the VE’s
 07 testimony is consistent with the Dictionary of Occupational Titles (DOT) because none of the
 08 jobs identified require particularly high levels of dexterity.³ Second, Plaintiff misquotes the
 09 DOT when contending that all three jobs require “constant” reaching and handling, and that
 10 one as requires “constant” fingering: the DOT defines all three jobs as requiring *frequent*
 11 reaching and handling, and one of the jobs as requiring *frequent* fingering (the others
 12 requiring occasional fingering).⁴ (Dkt. 16-1 at 3-4 (citing DOT 311.677-010, 230.663-010,
 13 209.587-034)). Dr. Heilbrunn’s opinion did not preclude *frequent* grasping, fine/dexterous
 14 movements, or manipulating abilities, but only *continuous* uses. (AR 341.) Thus, Dr.
 15 Heilbrunn’s opinions are not inconsistent with the VE’s testimony and Plaintiff has not
 16 identified any error in the RFC assessment or the ALJ’s step-five findings related to the
 17 limitations identified by Dr. Heilbrunn.

18 Lastly, Plaintiff’s counsel asked the VE whether Plaintiff’s right index finger pain, as

19 ³ The cafeteria attendant job requires low finger dexterity and middle-range manual dexterity.
 20 DOT 311.677-010. The deliverer position requires low finger and manual dexterity. DOT 230.663-
 21 010. A marking clerk position requires middle-range finger dexterity and low manual dexterity. DOT
 22 209.587-034.

23 ⁴The DOT defines a “frequent” requirement as existing between 1/3 and 2/3 of the time, and a
 24 “constant” requirement exists more than 2/3 of the time. *See, e.g.*, DOT 209.587-034 (defining
 25 “frequently”); DOT 726.684-050 (defining “constantly”).

01 described by Dr. Heilbrunn, would preclude Plaintiff's performance of the identified jobs, and
 02 the VE testified that it was "unclear"; that it "just depends on how severe the pain is and
 03 whether it's consistent or whether [INAUDIBLE] with his overall productivity." (AR 75.)
 04 Dr. Heilbrunn did not quantify the pain or specify how the pain would impair Plaintiff's use.
 05 See AR 341 ("[Plaintiff] has pain at the index finger, which also limits his ability of use."). In
 06 the absence of an identified, specific functional limitation, the Plaintiff cannot show that the
 07 ALJ's RFC assessment or related step-five findings fail to account for Dr. Heilbrunn's
 08 opinions in this respect, and therefore no error has been established.

09 Dr. Brown's Opinions

10 The ALJ described the opinions of Dr. Brown, who completed Plaintiff's only mental
 11 examination of record, without assigning any particular weight:

12 The [Plaintiff] underwent a consultative psychological evaluation in September
 13 2006. He alleged extreme difficulty understanding and remembering written
 14 and oral information. Upon mental status examination, he was oriented in all
 15 spheres. His attitude was very cooperative and he appeared motivated to do
 16 well. He was attentive throughout the test session. There were no signs of
 17 either suicidal or homicidal thinking. He did not appear to experience
 18 hallucinations or delusions. Cognitive testing revealed a verbal IQ of 76
 19 (borderline range), performance IQ of 86 (low average range), and a full scale
 20 IQ of 79 which placed him in the borderline range. His ratings in the verbal
 21 comprehension was borderline, perceptual organization was average, working
 memory was extremely low, and processing speed was borderline. Achievement testing revealed a reading score in the High School grade
 equivalent range, spelling was in the 5th grade equivalent range, and arithmetic
 in the 4th grade equivalent range. It was assessed that his scores were
 indica[tive] of a cognitive disorder. His diagnoses were rule out cognitive
 disorder (not otherwise specified), mathematics disorder, and disorder of
 written expression. His global assessment of functioning (GAF) was assessed
 to be 50. It was noted that he required further testing to determine the extent of
 his memory problems.

22 (AR 20 (citing AR 291-301).) The ALJ later assessed Plaintiff's RFC, finding that he "can

01 get along with others, respond and adapt to workplace changes and supervision, understand
 02 simple 1 to 2 step instructions and concentrate and perform simple tasks.” (AR 23.) Plaintiff
 03 argues that the ALJ’s RFC assessment fails to account for Plaintiff’s markedly impaired
 04 memory, difficulty learning new skills, impaired pace, and impaired math and spelling ability,
 05 as found by Dr. Brown. (Dkt. 16-1 at 3 (citing AR 293-96).)

06 The Commissioner argues that the ALJ was entitled to rely on state agency consultant
 07 James Bailey, Ph.D., to translate Dr. Brown’s opinions into workplace limitations. (Dkt. 14 at
 08 8.) Dr. Bailey is a state agency medical consultant and, as such, he is a highly qualified
 09 specialist with expertise in Social Security disability evaluation. *See* 20 C.F.R. §
 10 404.1527(5)(2)(i).

11 The Court agrees with the Commissioner. Dr. Bailey explicitly considered Dr.
 12 Brown’s opinions and reasonably converted her medical opinions into concrete functional
 13 limitations for purposes of disability evaluation, which is his area of expertise. Dr. Brown
 14 opined that Plaintiff’s abilities to reason, maintain sustained concentration and persistence,
 15 interact socially, and adapt were average or good, and those opinions are consistent with Dr.
 16 Bailey’s functional assessment. (*Compare* AR 294 with AR 318-320.) Dr. Bailey likewise
 17 translated Dr. Brown’s finding that Plaintiff has “[a]verage comprehension but significantly
 18 impaired Working Memory” into limitations on Plaintiff’s ability to understand, remember,
 19 and carry out detailed instructions. (*Compare* AR 294 with AR 318.) Dr. Bailey’s
 20 assessment that Plaintiff is not significantly limited in remembering locations and work-like
 21 procedures and remembering short and simple instructions (AR 318) is not inconsistent with
 22 Dr. Brown’s opinions. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008)

01 (explaining how an ALJ may translate mental limitations into concrete restrictions where the
 02 ALJ's assessment is "consistent with restrictions identified in the medical testimony").

03 Plaintiff contends that the ALJ overlooked Dr. Brown's findings that Plaintiff had
 04 impaired memory, difficulty learning new skills, or impaired math and spelling ability, but Dr.
 05 Bailey explicitly considered Dr. Brown's findings regarding Plaintiff's "memory problems,"
 06 "mathematics disorder" and "borderline intellectual functioning," and nonetheless concluded
 07 that he "retains the ability to understand, remember, and complete simple, repetitive tasks."
 08 (AR 320.) The ALJ was entitled to rely on Dr. Bailey's opinions regarding Plaintiff's
 09 concrete limitations, and in doing so, he did not err. *Stubbs-Danielson*, 539 F.3d at 1174; *see*
 10 *also* SSR 96-6p, 1996 WL 374180 (Jul. 2, 1996) (explaining how ALJs must consider a state
 11 agency consultant's assessment of a claimant's RFC).

12 Lastly, Plaintiff contends that the ALJ's RFC assessment fails to account for the
 13 implications of Dr. Brown's GAF score of 50. *See* Diagnostic and Statistical Manual of
 14 Mental Disorders 34 (4th ed. 2000) (DSM-IV-TR) (GAF of 41 to 50 describes "serious
 15 symptoms" or "any serious impairment in social, occupational, or school functioning"). The
 16 ALJ mentioned Plaintiff's GAF score (AR 20), but Plaintiff contends that the ALJ should
 17 have interpreted the GAF score to mean that Plaintiff "would more likely than not have
 18 difficulty sustaining competitive employment." (Dkt. 16-1 at 5.) But Plaintiff's explanation
 19 is not the only reasonable interpretation of his GAF score, and has not shown that it was
 20 unreasonable for the ALJ to conclude that Plaintiff retained the ability to "respond and adapt
 21 to workplace changes and supervision, understand simple 1 to 2 step instructions and
 22 concentrate and perform simple tasks." (AR 23.) Particularly in light of the Commissioner's

01 determination that the GAF scale “does not have a direct correlation to the severity
02 requirements in [the Social Security Administration’s] mental disorders listings” (65 Fed.
03 Reg. 50,746, 50,765-766 (Aug. 21, 2000)), the ALJ’s reasonable interpretation should be
04 affirmed. See *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is
05 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be
06 upheld.”).

RFC Assessment & VE Testimony

In addition to the arguments related to the ALJ's RFC assessment addressed in the previous section, Plaintiff further contends that the ALJ erred by relying on the VE's testimony that Plaintiff could perform jobs requiring reasoning level 2. According to Plaintiff, a finding that he could perform jobs requiring reasoning level 2 is inconsistent with the ALJ's RFC assessment limiting him to understanding simple 1- to 2-step instructions and performing simple tasks. The Commissioner agrees that all of the jobs identified by the VE required reasoning level 2, but contends that Plaintiff is not precluded from performing such jobs under the ALJ's RFC assessment.

16 The DOT defines jobs requiring reasoning level 2 as requiring the ability to “[a]pply
17 commonsense understanding to carry out detailed but uninvolved written or oral instructions.
18 Deal with problems involving a few concrete variables in or from standardized situations.”
19 DOT, Appendix C, *available at* 1991 WL 688702 (1991). Reasoning level 1 requires a
20 worker to “[a]pply commonsense understanding to carry out simple one- or two-step
21 instructions. Deal with standardized situations with occasional or no variables in or from
22 these situations encountered on the job.” *Id.*

01 There is no Ninth Circuit authority defining the precise correlation between reasoning
 02 levels and functional limitations identified in an RFC assessment. Some district court cases
 03 emphasize that DOT reasoning levels do not directly match functional limitations as defined
 04 by Social Security regulations. *See Meissl v. Barnhart*, 403 F.Supp.2d 981, 983 (C.D. Cal.
 05 2005); *Bordbar v. Astrue*, 2011 WL 486540, at *3 (C.D. Cal. 2011). Other unpublished cases
 06 reason that a limitation to understanding one- or two-step instructions correlates to reasoning
 07 level 1 jobs. *See Pouria v. Astrue*, 2012 WL 1977278, at *1-2 (C.D. Cal. Jun. 1, 2012);
 08 *Hamlett v. Astrue*, 2012 WL 469722, at *4 (C.D. Cal. Feb. 14, 2012); *Grigsby v. Astrue*, 2010
 09 WL 309013, at *2 (C.D. Cal. Jan. 22, 2010). Others have specifically held that a limitation to
 10 one- or two-step instructions is consistent with jobs requiring reasoning level 1 *or* 2. *See, e.g.*,
 11 *Lee v. Astrue*, 2010 WL 653980, at *10-11 (E.D. Cal. Feb. 19, 2010); *Seechan v. Astrue*, 2010
 12 WL 1812637, at *10-11 (E.D. Cal. May 5, 2010); *Harrington v. Comm'r of Social Sec.*
 13 Admin., 2008 WL 4492614 (S.D. Cal. Sept. 29, 2008).

14 In *Meissl*, the only published case on this issue within this circuit, the ALJ limited the
 15 claimant to simple tasks performed at a routine or repetitive pace, but also accepted a VE's
 16 testimony that Plaintiff could perform two jobs requiring a reasoning level of 2. 403
 17 F.Supp.2d at 982. The court affirmed, reasoning:

18 Here, the ALJ found that Meissl could perform not just simple tasks but also
 19 ones that had some element of repetitiveness to them. A reasoning level of one
 20 on the DOT scale requires slightly less than this level of reasoning. While
 21 reasoning level two notes the worker must be able to follow "detailed"
 22 instructions, it also (as previously noted) downplayed the rigorousness of those
 instructions by labeling them as being "uninvolved."

The Court finds that there is much to recommend for believing that Meissl's reasoning level is at level two rather than at level one. A reasoning level of one

01 indicates, both by the fact that it is the lowest rung on the development scale as
 02 well as the fairly limited reasoning required to do the job, as applying to the
 03 most elementary of occupations; only the slightest bit of rote reasoning being
 04 required. For example, the DOT describes the following jobs as requiring only
 05 a reasoning level of one: Counting cows as they come off a truck (job title
 06 Checker (motor trans.)); pasting labels on filled whiskey bottles (job title
 07 Bottling-Line Attendant (beverage)); and tapping the lid of cans with a stick
 08 (job title Vacuum Tester, Cans). *See* DOT at 931, 936, 938. Someone able to
 09 perform simple, repetitive instructions indicates a level of reasoning
 10 sophistication above those listed. Other courts have so held. *See Hackett v.*
Barnhart, 395 F.3d 1168, 1176 (10th Cir. 2005) (holding that “level-two
 11 reasoning appears more consistent with Plaintiff’s RFC” to “simple and routine
 12 work tasks”); *Money v. Barnhart*, 91 Fed.Appx. 210, 214, 2004 WL 362291, at
 13 *3 (3d Cir. 2004) (“Working at reasoning level 2 would not contradict the
 14 mandate that her work be simple, routine and repetitive”). As one court
 15 explained:

16 The ALJ’s limitation for the Plaintiff, with respect to an
 17 appropriate reasoning level, was that she could perform work
 18 which involved simple, routine, repetitive, concrete, tangible
 19 tasks. Therefore, the DOT’s level two reasoning requirement did
 20 not conflict with the ALJ’s prescribed limitation. Although the
 21 DOT definition does state that the job requires the
 22 understanding to carry out detailed instructions, it specifically
 23 caveats that the instructions would be uninvolved—that is, not a
 24 high level of reasoning.

25 403 F.Supp.2d at 984-85 (quoting *Flaherty v. Halter*, 182 F. Supp.2d 824, 850 (D. Minn.
 26 2001)).

27 Though the Commissioner emphasizes that *Meissl* found that a reasoning level 2 was
 28 consistent with a limitation to simple and routine work tasks, the Commissioner does not
 29 acknowledge that the ALJ’s RFC assessment here is distinguishable from the assessment in
 30 *Meissl*: here, the ALJ specifically limited Plaintiff to simple tasks *with one- or two-step*
 31 *instructions*. *Meissl* does not address whether *this* limitation is inconsistent with reasoning
 32 level 2. While *Meissl* stands for the proposition that a limitation to simple tasks is not

01 necessarily inconsistent with an ability to perform a job requiring reasoning level 2, Plaintiff
 02 was arguably more limited than the claimant in *Meissl*.⁵

03 The limitations identified by the ALJ in this case match more closely to the limitations
 04 described in *Pouria*, *Hamlett*, and *Grigsby*. In all three of these recent cases, the ALJs limited
 05 the claimants to jobs involving no more than two-step instructions, and the courts held that
 06 such a limitation corresponds to reasoning level 1. *See Pouria*, 2012 WL 1977278, at *3
 07 (“[A] limitation to one- or two-step tasks corresponds to Reasoning Level One”); *Hamlett*,
 08 2012 WL 469722, at *4 (“A limitation of two steps of instruction corresponds to Level 1
 09 reasoning); *Grigsby*, 2010 WL 309013, at *2 (“The restriction to jobs involving no more than
 10 two-step instructions is what distinguishes Level 1 reasoning from Level 2 reasoning.”).

11 Not all district courts in the Ninth Circuit have agreed with this analysis, however.
 12 Some courts focus on the fact that reasoning level 1 jobs are on the lowest end of the
 13 reasoning scale, and conclude that the ALJ’s RFC assessment does not restrict the claimant to
 14 that degree. *See, e.g.*, *Lee*, 2010 WL 653980, at *11; *Seechan*, 2010 WL 1812637, at *10-11.
 15 In *Harrington*, the court determined that a one/two-step instruction limitation was compatible
 16 with reasoning level 2 in light of the other limitations described in the RFC assessment:

17 The ALJ found that Harrington has the following residual functional capacity:

18 The claimant can understand detailed but uncomplicated
 19 instructions and simple, one/two step instructions, can maintain
 20 concentration and attention for simple, repetitive work, can
 21 relate and interact with the public, supervisors, and co-workers,
 22

21 ⁵ The Tenth Circuit case also cited by the Commissioner is likewise not precisely on all fours.
 22 *See Hackett v. Barnhart*, 395 F.3d 1168, 1176 (10th Cir. 2005) (concluding that a limitation to “simple
 23 and routine work tasks” was inconsistent with a reasoning level 3 job and “more consistent” with a
 24 reasoning level 2 job).

01 and can tolerate low and moderate to high stress work.

02 Judge Parker did not limit Plaintiff to only having the ability to apply
 03 “commonsense understanding to carry out simple one- or two-step
 04 instructions” or only “deal with standardized situations with occasional or no
 05 variables,” which is the essence of reasoning level one. DOT, No. 230.687-
 06 010 at 205. Rather, he found that Plaintiff can understand “detailed but
 07 uncomplicated instructions” and perform “simple, repetitive work.” The
 08 residual functional capacity finding clearly puts Plaintiff beyond reasoning at
 09 level one.

10 2008 WL 4492614, at *10 (internal citations to the administrative record omitted). The
 11 *Harrington* court’s approach requires a close reading of the ALJ’s RFC assessment in order to
 12 determine how it compares to reasoning level requirements, and this approach has also been
 13 employed in this district. *See Morgan v. Astrue*, Case No. 11-422JLR, Report and
 14 Recommendation (Dkt. 22) at 10-15 (Nov. 28, 2011).

15 In this case, the ALJ’s RFC assessment language is analogous to reasoning level 1
 16 only. The ALJ specifically found that Plaintiff could understand “simple 1 to 2 step
 17 instructions” and “perform simple tasks.” (AR 23.) The ALJ does not address the question of
 18 Plaintiff’s ability to carry out detailed (though uninvolved) instructions, as is required in
 19 reasoning level 2 jobs. On remand, the ALJ should specifically address Plaintiff’s ability to
 20 perform at the reasoning level required by the proffered jobs, with factual findings and
 21 appropriate references to the record.⁶

22 ⁶ Plaintiff also briefly argues that the ALJ’s hypothetical failed to include his pace limitations.
 23 (Dkt. 13 at 18-19.) But the ALJ’s RFC assessment does not include a pace limitation, and neither Dr.
 24 Brown nor Dr. Bailey identified a pace limitation. Dr. Brown describes Plaintiff’s limits in processing
 25 speed, but this limitation refers to the speed with which Plaintiff’s processes information, not the pace
 26 with which he completes work tasks. (AR 296.) Thus, because Plaintiff has not shown that the ALJ
 27 should have found a pace limitation with regard to completing work tasks (*see* AR 319 (describing a
 28 pace limitation for purposes of disability evaluation)), the ALJ did not err by failing to include a pace

Plaintiff's Credibility

The ALJ summarized Plaintiff's description of his impairments and how they affect his ability to work:

[Plaintiff] alleged the inability to work due to the inability to bend the right forefinger due to previous torn nerve endings and ligaments. He also alleged problems staying focused and memory deficit. However, he indicated that he took psychotropic medication for only 1½ to 2 months. He denied receiving any psychotherapy after 2002. He reported that he received chiropractic care in the 1990's due to back pain related to a childhood back injury. He denied receiving any current medical treatment for recurrent back pain but indicated that at times, he takes over-the-counter aspirin or Tylenol. He denied having any back injections or back surgery in the past. Regarding his functional capacity, he alleged the inability to sit for no more than 3 to 4 hours at one time, lift no more than 50 to 60 pounds, walk for up to one hour on a flat surface, and stand for up to one hour at one time. In reference to activities, he testified that he is able to drive a motorized vehicle, visit with his girl friend three times per week, visit his children, watch television, help his friend by washing dishes, and perform other activities for his friend.

(AR 24.)

The ALJ found that Plaintiff's alleged "symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment" (AR 24) and provided three⁷ specific reasons for discounting Plaintiff's allegations: (1) Plaintiff's lengthy work history, despite his cognitive impairments; (2) Plaintiff's daily activities; and (3) Plaintiff's lack of treatment or medications for his mental-health symptoms. (AR 24-25.)

111

limitation in the hypothetical.

⁷ The ALJ also notes Plaintiff's criminal history in this section, and Plaintiff contends that this was an improper reason to discount Plaintiff's credibility. (Dkt. 16-1 at 8.) Reading the section as a whole, however, it appears that the ALJ mentioned Plaintiff's criminal history to explain the timeline of Plaintiff's prior work, showing that his job ended because of incarceration and not because of impairments. (AR 24.) Thus, the Court concludes that the ALJ did not discount Plaintiff's credibility on account of his criminal history.

**REPORT AND RECOMMENDATION RE:
SOCIAL SECURITY DISABILITY APPEAL
PAGE -17**

01 Legal Standards

02 In assessing credibility, an ALJ must first determine whether a claimant presents
03 “objective medical evidence of an underlying impairment ‘which could reasonably be
04 expected to produce the pain or other symptoms alleged.’” *Lingenfelter v. Astrue*, 504 F.3d
05 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)).
06 Given presentation of such evidence, and absent evidence of malingering, an ALJ must
07 provide clear and convincing reasons to reject a claimant’s testimony. *Id.* See also *Vertigan*
08 v. *Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). Plaintiff contends that the ALJ did not
09 provide any legally valid reason to reject any of his testimony.

10 Work History

11 The ALJ described the inconsistency between Plaintiff’s work history and the
12 debilitating symptoms he described experiencing due to his lifelong cognitive impairments:

13 Despite the claimant’s allegations of cognitive deficits, he worked steadily and
14 successfully from 1981 to 2001. (Exhibit 3D). He reported that he stopped
15 working in 2005 after he lost his job. At the previous job, he was laid off from
16 work. It is noted that [] he was performing at [] “satisfactory” to “highly
17 satisfactory” levels before he lost his job as a result of a reduction in force
18 (RIF) employer action and not for any medical reason or alleged impairments.
19 (See Exhibit 14F). In addition, it is noted that the claimant was incarcerated in
20 2003 for 13 to 15 months (through 2005).

21 (AR 24.) Plaintiff contends that he earned “little” between 1981 and 1987, and that his main
22 job after that time with the Navy was an accommodated job for handicapped people. Thus,
Plaintiff posits that the ALJ erred in viewing his work history as inconsistent with his
allegations of cognitive deficits.

Unfortunately for Plaintiff, the record does not corroborate his characterization of the

01 Navy job as “accommodated.” Beyond his own description of the job as accommodating his
02 tendency to get confused (AR 183), Plaintiff relies exclusively on a 1986 letter written by a
03 vocational rehabilitation counselor asking the personnel director at Bremerton Naval Base to
04 consider hiring Plaintiff via the Severely Disabled Hiring Program. (AR 365.) The letter
05 does not suggest that the job was accommodated, but only that Plaintiff was hired via this
06 program. Furthermore, when Plaintiff’s job was terminated, his termination letter referred to
07 his job as a “competitive” (not “excepted,” the term for a person performing accommodated
08 work) employee. *See* AR 366. Thus, the record does not support Plaintiff’s contention that
09 he performed accommodated work.

10 Accordingly, Plaintiff’s successful and lengthy work history does undermine his
11 testimony that his cognitive impairments prevent him from working. When asked by the ALJ
12 to name the biggest reason why he cannot work, the Plaintiff answered that he is “slow, I
13 guess.” (AR 60.) But Plaintiff has not shown that his cognitive condition has worsened over
14 time, or that any of his previous jobs were terminated as a result of his cognitive impairments.
15 (*See* AR 64-68 (describing the circumstances under which he lost his previous jobs: reduction
16 in force, drug relapse, finger injury)). The ALJ was therefore entitled to disbelieve Plaintiff’s
17 description of severe cognitive impairment as inconsistent with Plaintiff’s successful years of
18 work history. *See Light v. Social Sec. Admin.*, 119 F.d 789, 792 (9th Cir. 1997) (“In weighing
19 a claimant’s credibility, the ALJ may consider . . . inconsistencies either in his testimony or
20 between his testimony and his conduct, his daily activities, his work record, and testimony
21 from physicians and third parties concerning the nature, severity, and effect of the symptoms
22 of which he complains.”)

01 Daily Activities

02 The ALJ briefly mentions Plaintiff's daily activities as inconsistent with his
 03 allegations, but the ALJ does not specify which activities contradict which allegations. (AR
 04 24.) Earlier in the decision, however, the ALJ did summarize Plaintiff's daily activities —
 05 caring for his daughter and son, watching television and playing video games, caring for a cat,
 06 taking care of personal needs, shopping for groceries and preparing meals, washing dishes,
 07 driving — and concluded that Plaintiff's ability to complete those activities demonstrates
 08 "mild restriction." (AR 21.) The ALJ was entitled to consider those activities for purposes of
 09 evaluating Plaintiff's credibility, and reasonably found that his own description of daily
 10 activities was inconsistent with his description of a complete inability to work. *See*
 11 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (explaining that inconsistencies in
 12 a claimant's testimony are properly considered in assessing a claimant's credibility).

13 Lack of Mental-Health Treatment or Medications

14 The ALJ also cited Plaintiff's lack of treatment or medication related to his psychiatric
 15 or mental-health symptoms:

16 If an impairment can reasonably be controlled by medication or treatment, it
 17 cannot serve as a basis for a finding of disability. (20 CFR 404.1530). He
 indicated that he is not taking any medications for any psychiatric symptoms.

18 The claimant is not seeking or receiving frequent medical treatment, which
 19 tends to undermine his allegations of incapacitating symptoms. He reported
 20 that he does not receive regular medication treatment or receive any treatment
 from a mental health professional.

21 (AR 24-25.) It is unclear precisely which "incapacitating symptoms" the ALJ had in mind
 22 here. Assuming that the ALJ is referring to Plaintiff's depression, it is true that Plaintiff has

01 not received treatment or medication for his depression — and this could be a reason to
02 discount Plaintiff's brief descriptions of depression symptoms. (AR 221, 237.) For the most
03 part, Plaintiff's testimony and statements emphasized his physical injuries and his cognitive
04 impairments. *See* AR 60 (Plaintiff's hearing testimony describing his cognitive impairments
05 as the main reason why he cannot work); AR 175 (Plaintiff's statement describing his
06 physical injuries and his cognitive impairments as limiting his ability to work). But to the
07 extent that Plaintiff also described depression symptoms, his lack of treatment and medication
08 for those symptoms is a clear and convincing reason to discount his subjective description.

09 As a final comment on the ALJ's credibility analysis, the Court notes that the Plaintiff
10 has not identified any particular testimony that he contends was either erroneously rejected or
11 clearly establishes disability; indeed, the ALJ's RFC assessment accounts for Plaintiff's
12 cognitive impairments and right-hand limitations, at least to some degree. The ALJ's adverse
13 credibility finding may have been superfluous, given that Plaintiff's specific descriptions of
14 impairments are not wholly inconsistent with the ALJ's RFC assessment. But to the extent
15 that Plaintiff testified that he was entirely unable to work, the Court finds that the ALJ
16 provided clear and convincing reasons to discount his credibility and thus did not err.

17 Lay Witness Evidence

18 The record contains written statements from lay witnesses Della Mydske and Judy
19 Munn. Ms. Mydske described Plaintiff's functioning in one statement dated March 6, 2007,
20 and another questionnaire dated November 23, 2009. (AR 203-11, 244-49.) The ALJ did not
21 mention Ms. Mydske's statements in his written decision.

22 The ALJ briefly refers to Ms. Munn's report that Plaintiff has a learning disability but

01 also “excellent visual learning skills.” (AR 20 (citing AR 365).) Plaintiff contends that the
 02 ALJ overlooked Ms. Munn’s statement that Plaintiff’s “disabilities are obviously a factor in
 03 preventing him from obtaining employment in the private sector.” Dkt. 13 at 21 (citing AR
 04 365).

05 Legal Standards

06 Lay witness testimony as to a claimant’s symptoms or how an impairment affects
 07 ability to work is competent evidence and cannot be disregarded without comment. *Van*
 08 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of
 09 lay witnesses only upon giving germane reasons. *Smolen v. Chater*, 80 F.3d 1273, 1288-89
 10 (9th Cir. 1996) (finding rejection of testimony of family members because, *inter alia*, they
 11 were ““understandably advocates, and biased”” amounted to “wholesale dismissal of the
 12 testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane
 13 to each individual who testified.”) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
 14 1993)).

15 However, the failure to disregard lay testimony without comment may be deemed
 16 harmless. An error is harmless where it is ““inconsequential to the ultimate nondisability
 17 determination.”” *Molina v. Astrue*, 674 F.3d 1104, 1122 (9th Cir. 2012) (quoting *Stout v.*
Comm’r, Social Sec. Admin., 454 F.3d 1050 1055 (9th Cir. 2006)). As recently held by the
 19 Ninth Circuit, ““an ALJ’s failure to comment upon lay witness testimony is harmless where
 20 ‘the same evidence that the ALJ referred to in discrediting [the claimant’s] claims also
 21 discredits [the laywitness’s] claims.”” *Id.* at 1122 (quoting *Buckner v. Astrue*, 646 F.3d 549,
 22 560 (8th Cir. 2011); also describing harmless error as occurring where an “ALJ’s well-

01 supported reasons for rejecting the claimant's testimony apply equally well to the lay witness
 02 testimony[.]") The Ninth Circuit distinguished its prior decision in *Stout*, wherein the Court
 03 held that failure to address lay testimony may not be deemed harmless where "no reasonable
 04 ALJ, when fully crediting the testimony, could have reached a different disability
 05 determination[.]" as involving lay testimony identifying limitations not considered by the
 06 ALJ, uncontradicted by anything in the record, and highly probative of an individual's
 07 inability to work in a competitive environment. *Id.* at *26-28.

08 Ms. Mydske's Statements

09 The Commissioner concedes that the ALJ did not address Ms. Mydske's statements in
 10 the written decision, but argues that the error was harmless because her testimony could be
 11 rejected for the same reasons that the ALJ rejected Plaintiff's testimony. Specifically, the
 12 Commissioner contends that Ms. Mydske's description of Plaintiff's activities was
 13 inconsistent with a description of debilitating symptoms, and that her description of his
 14 abilities is inconsistent with his work history.

15 The Court cannot find the ALJ's failure to consider Ms. Mydske's statements to be
 16 harmless, however, because Ms. Mydske provided more detailed descriptions of Plaintiff's
 17 abilities than Plaintiff himself provided. Ms. Mydske provided specific examples of
 18 Plaintiff's impaired memory; described Plaintiff's neck, knee, and hip pain; and detailed
 19 Plaintiff's lack of "common sense" and difficulty understanding instructions, and inability to
 20 stay on task. (AR 244-49.) She also described Plaintiff's right index finger as "not working
 21 at all." (AR 245.) Ms. Mydske's statements are not merely reiterations of Plaintiff's own
 22 statements, and the ALJ's reasons for discounting Plaintiff's testimony do not apply equally

01 well to Ms. Mydske's statements. The ALJ's failure to address Ms. Mydske's statements was
02 therefore not harmless. *See Molina v. Astrue*, 674 F.3d 1104, 1121-22 (9th Cir. 2012)
03 (holding that an ALJ's failure to comment upon lay witness testimony describing the same
04 limitations as the claimant described is harmless where the same evidence that the ALJ
05 referred to in discrediting the claimant's testimony applies to the lay testimony). On remand,
06 the ALJ shall consider Ms. Mydske's statements, explicitly address the weight to be given the
07 statements, and, if necessary, reconsider the effect of Ms. Mydske's statements on any other
08 findings.

09 Ms. Munn's Letter

10 Ms. Munn was a vocational rehabilitation counselor in Washington's Department of
11 Social and Health Services' vocational rehabilitation division, and wrote a letter on Plaintiff's
12 behalf on October 24, 1986, to recommend him for employment at a U.S. Naval base in
13 Bremerton, Washington. (AR 365.) Ms. Munn wrote, in pertinent part:

14 Don has a Specific Learning Disability (a developmental reading and
15 language disorder). He has excellent visual learning skills, but he has
16 functional limitations learning information auditorily. His training should take
into consideration that he learns very well by demonstration and written
instructions that are not of a complex nature.

17 Don's disabilities are obviously a factor in preventing him from
18 obtaining employment in the private sector.

19 (AR 365.) The ALJ referred to Ms. Munn's description of Don's limitations in the first
20 quoted paragraph, but Plaintiff contends that the ALJ erred by not referencing the second
21 quoted paragraph.

22 The Court disagrees with Plaintiff. The second quoted paragraph contains an opinion

01 beyond Ms. Munn's field of expertise, and the opinion is of questionable value to the ALJ's
02 findings in the five-step disability evaluation process. Whether Plaintiff's impairments
03 prevent him from performing a job is one of the issues reserved to the Commissioner. *See*
04 SSR 96-5p, 1996 WL 374183 (Jul. 2, 1996). Thus, the ALJ did not err in failing to discuss
05 Ms. Munn's opinion regarding the effect of Plaintiff's disabilities on his employability.

06 **CONCLUSION**

07 Remand for further proceedings is appropriate where additional proceedings could
08 remedy defects in the Commissioner's decision. *See Harman v. Apfel*, 211 F.3d 1172, 1179
09 (9th Cir. 2000). Upon remand, the ALJ should either make further findings regarding
10 Plaintiff's ability to perform reasoning level 2 jobs, or obtain further VE testimony regarding
11 alternative occupations that Plaintiff could perform. The ALJ should also discuss the lay
12 witness statements of Ms. Mydske.

13 For the reasons set forth above, this matter should be REVERSED and REMANDED
14 for further administrative proceedings.

15 DATED this 12th day of September, 2012.

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17 
18 Mary Alice Theiler
United States Magistrate Judge
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